Supreme Court, U.S.
FILED
APR 25 2000
OFFICE OF THE CLERK

No. 99-7720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN
OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, PETITIONER

v.

TROY A. ASHMUS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of California
DAVID P. DRULINER
Chief Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
Counsel of Record

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
(415) 703-5858

35 pp

CAPITAL CASE

QUESTIONS PRESENTED

Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) reforms many of the rules governing federal habeas corpus review of state death penalty judgments, but applies only if the state meets certain conditions, including providing state-law "standards of competency for the appointment" of counsel in state collateral review proceedings. In a decision that otherwise rests on several disputed assumptions of state law, the court of appeals determined that California fails to qualify because its counsel competency standards are insufficiently "binding and mandatory"—a "requirement" the court found "implicit" in Chapter 154. Having disqualified California on this ground, the court deemed none of the disputed state-law questions "determinative," and denied the state's motion to certify them to the California Supreme Court for authoritative resolution. The questions presented in this petition are:

1. Whether, as a condition of complying with Chapter 154, states are implicitly required to fashion counsel competency standards that allow no exceptions, no opportunity for departure, and no occasion for state courts to inform the application of those standards with any discretionary considerations.

2. Whether the court of appeals erred by failing to certify disputed state-law questions to the state supreme court.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutes and rules involved 2
Statement 2
Reasons for granting the petition 17
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 18, 28, 29
Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996) 11
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 29
Calderon v. Ashmus, 523 U.S. 740 (1998) 3, 8
Fiore v. White, 120 S. Ct. 469, 473 (1999) 29
Huggins. v. Isenbarger, 798 F.2d 203 (7th Cir.1986) .. 28
In re Anderson, 69 Cal. 2d 613 (1968) 3, 12, 16, 17
In re Clark, 5 Cal. 4th 750 (1991) 3
In re Sanders, 21 Cal. 4th 697 (1999) 12, 16, 17, 28
In re Robbins, 18 Cal. 4th 770 (1998) 9
Lackey v. Texas, 514 U.S. 1045 (1995) 26
Lindh v. Murphy, 521 U.S. 320 (1997) 6, 17, 25
Mata v. Johnson, 99 F.3d 1261 (5th Cir. 1996) 20
McCleskey v. Zant, 499 U.S. 467 (1990) 26
Ohio v. Roberts, 448 U.S. 56 (1980) 19
People v. Ashmus, 54 Cal. 3d 932 (1991) 6
Regents of the Univ. of Calif. v. Public Employment Relations Bd., 485 U.S. 589 (1988) 19
Weeks v. Angelone, 4 F. Supp. 2d 497 (E.D. Va. 1998) 11
Wright v. Angelone, 944 F. Supp. 460 (E.D. Va. 1996) 11, 25

Constitution, Statutes and Rules:

U.S. Const., Art. III 8
U.S. Const., Amend. XI 6, 7
18 U.S.C. §§ 1693-1699 19
18 U.S.C. § 3501 19
21 U.S.C. § 848(q) 22, 24
28 U.S.C. § 2254 3
39 U.S.C. §§ 601-606 19
42 U.S.C. § 1983 6
Antiterrorism and Effective Death Penalty Act of 1996 ..... 2, 6, 20
Chapter 154 ..... *passim*
28 U.S.C. § 2261 2
28 U.S.C. § 2265 ..... 2, 6, 12, 14
110 Stat. 1226 26
Fed. R. App. P. 2 18
Fed. R. App. P. 28(j) 12
Tax Ct. R. 200(c) 19
Ariz. Rev. Stat. § 13-4041 24
Ariz. R. Crim. P. 6.8(d) 24
Ark. R. Crim. P. 37.5(c)(4) 24
Cal. Gov't Code § 68070 ..... 2, 10, 14, 15, 16, 27
Cal. Gov't Code § 68511.5 ..... 2, 4, 12, 13, 14, 27
Cal. Gov't Code § 68662 ..... 17, 24
Cal. Gov't Code § 68663 3
Cal. Penal Code §1241 ..... 3, 10
Cal. R. Ct. 29.5 10
Cal. R. Ct. 39.50 27
Cal. R. Ct. 76.5 ..... *passim*
Cal. R. Ct. 76.6 24
Cal. Sup. Ct. Policies Regarding Cases Arising From Judgments of Death ..... *passim*
Cal. Sup. Ct. Payment Guidelines for Appointed Counsel Representing Indigent Criminal Defendants 10
Cal. R. Ct., Appen., Standards of Judicial Administration, Section 20(c) ..... *passim*

Cal. Sup. Ct., Internal Operating Practices and Procedures (IOPPs), Rule XIII/XIV 12, 17, 19, 26, 28
Idaho Crim. R. 44.3(3)(b)(2) 23
Kan. Admin. Regs. 105-3-2 23
Md. Code Ann., Art. 27A, § 6 23
Miss. R. App. P. 22(c) 24
Nev. Sup. Ct. R. 250 24
N.Y. Ct. Rules § 515.2(1)(b) & (3)(b) 23-24
Ohio Sup. R. 20, § II(C) 24
Or. R. Appt. Counsel Std. 3.1(4) 23
S.C. Code Ann. §17-27-160(B) 24
S.C. R. Ct. 608(f) 24
Wa. R. App. P. 16.25 24

Miscellaneous:

American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (February 1989) 22-23
Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Powell Committee Report (1989), 135 Cong. Rec. at S13483 ..... 20-21, 25, 26
Section-by-Section Analysis of the Comprehensive Violent Crime Control Act of 1991, 137 Cong. Rec. at S3220 ..... 21, 25

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

JEANNE S. WOODFORD, ACTING WARDEN
OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, PETITIONER

v.

TROY A. ASHMUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of California, on behalf of Jeanne S. Woodford, Acting Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 24a-42a) is reported at 202 F.3d 1160. An order amending that opinion and the amended opinion reflecting that order (Pet. App. 1a-22a) are reported at ___ F.3d ___ (2000 WL 256627). The opinion of the district court (Pet. App. 43a-78a) is reported at 31 F. Supp. 2d 1175.

JURISDICTION

The Court of Appeals entered its judgment on January 24, 2000. A petition for rehearing and rehearing en banc was denied on March 9, 2000. Pet. App. 4a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant portions of Chapter 154, 28 U.S.C. §§ 2261, 2265, are reproduced in the Appendix to this petition, see Pet. App. 79a-82a, as are the following relevant provisions of California law: (1) Cal. Gov't Code § 68511.5 (West Supp. 1997); (2) Cal. Rules of Court, rule 76.5 (West 1996); (3) Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20 (West 1996); (4) Cal. Sup. Ct. Policies Regarding Cases Arising From Judgments of Death (West 1996); and (5) Cal. Gov't Code § 68070 (West Supp. 1997). See Pet. App. 83a-94a. Also included in the Appendix are instructive provisions of federal law and of the law of other capital jurisdictions. See *id.* at 95a-172a.

STATEMENT

Chapter 154 reforms federal habeas corpus review of final death judgments that originate in qualifying states. This case concerns whether, as a condition of complying with Chapter 154, states are required to fashion counsel competency standards that allow no exceptions, no opportunity for departure, and no occasion for the exercise of state judicial discretion. The United States Court of Appeals for the Ninth Circuit found that Congress made such a requirement "implicit" when it specified, in 28 U.S.C. § 2265, that qualifying states must provide, by statute or rule of court of last resort, "standards of competency for the appointment" of state collateral counsel in capital cases. The court also disqualified California based on its belief that the provisions of state law establishing the state's mechanism for the appointment of capital collateral counsel and providing standards of competency for such appointments are neither "rules of court" nor "statutes." Each of these alternative grounds, however, rests on assumptions about California law that are contrary to the understanding of the California Attorney General. Insisting that its disputed pronouncements of state law were neither "novel" nor "determinative," the Ninth Circuit denied the state's motion to certify those matters to the California Supreme Court for authoritative resolution.

The question of California's compliance with Chapter 154 was presented to the district and circuit courts following this Court's decision in *Calderon v. Ashmus*, 523 U.S. 740 (1998), to which respondent, a California prisoner pursuing a collateral attack on his 1986 death judgment, was also a party. Respondent's federal habeas corpus proceedings, initiated under 28 U.S.C. § 2254, have been pending in the United States District Court for the Northern District of California since 1993.

1. More than 30 years ago, the California Supreme Court conferred upon death-sentenced prisoners a state-law right to the assistance of appointed counsel in state postconviction collateral review proceedings "undertaken between the termination of their state appeals and their execution." *In re Anderson*, 69 Cal. 2d 613, 633 (1968). Under California law, collateral counsel, like counsel appointed by a state appellate court for any other purpose, are statutorily guaranteed "a reasonable sum for compensation and necessary expenses." Cal. Penal Code § 1241. On June 6, 1989, the California Supreme Court issued its Policies Regarding Cases Arising From Judgments of Death, see Supreme Court, Cal. Rules of Court, Court Rules Vol. 23 pt. 3, at 143 (West 1996), which systematically extended the state-law guarantee of collateral representation to all death-sentenced prisoners "whether the appeals * * * are pending or previously resolved," Pet. App. 89a; the Policies effected that change in state law by directly and immediately "impos[ing] an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus." *In re Clark*, 5 Cal. 4th 750, 783 (1993).[1/]

---

1. Thus, the attorneys assigned to the appeal presumptively also served as the prisoner's collateral counsel. This presumption was reversed by changes in state law that became effective in 1998; for cases in which appointments are made thereafter, the duties of appellate and collateral representation are divided between different counsel, unless the prisoner and counsel expressly request otherwise. See Cal. Gov't Code § 68663 (West Supp. 2000). In all other respects, the essential structure of California's capital review mechanism has remained unchanged since June 6, 1989—the date on which the state maintains it perfected its Chapter 154-qualifying capital review mechanism. See also note 10, *infra*. Of

Appointment of capital counsel by the California Supreme Court had, since 1985, been governed by the competency criteria specified in Section 20(c) of the Standards of Judicial Administration, see Appen. to Cal. Rules of Court, Court Rules Vol. 23, pt. 2, at 679-680 (West 1996). See also Cal. Gov't Code § 68511.5 (Pet. App. 83a). The standards (Pet. App. 87a) specify as follows:

> **(c) [Supreme Court]** The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

These standards were promulgated pursuant to California Rule of Court 76.5 (Pet. App. 84a-85a), which reads as follows:

> **Rule 76.5. Appointment of counsel in criminal appeals**
>
> **(a) [Procedures]** Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.
>
> **(b) [Lists of qualified attorneys]** On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more

---

California's 570 death-sentenced prisoners, approximately 340 had counsel appointed before 1998; of those, approximately 300 (including respondent) had their judgments affirmed after June 6, 1989.

lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

2. On May 19, 1984, respondent sexually attacked and murdered a seven-year-old girl in a public park in Sacramento, California. He was tried and sentenced to death in 1986. In March 1987—more than two years after adoption of the Section 20 standards—the California Supreme Court appointed counsel to represent respondent in that court. In December 1991—more than two years after implementation of the Death Penalty Policies—the California Supreme Court unanimously affirmed respondent's death judgment. *People v. Ashmus*, 54 Cal. 3d 932 (1991), cert. denied 506 U.S. 841 (1992).

3. On February 17, 1993, respondent sought appointment of new counsel from the federal district court, which immediately stayed the execution that had been scheduled for March 12, 1993. The federal proceedings remain pending. Record, Doc. Nos. 1-265.

4. On April 24, 1996, the AEDPA went into effect. Enacted to expedite capital habeas cases, see *Lindh v. Murphy*, 521 U.S. 320, 331 (1997), and to address the "perceived acquiescence in capital defendants' dilatory tactics by some federal courts," *id.* at 338 (Rehnquist, C.J., dissenting), Chapter 154 of the AEDPA implemented immediately-effective reforms governing federal review of state capital judgments "with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Id.* at 327. Because California law authorizes death-sentenced prisoners "to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack," the state is a "unitary review" jurisdiction within the meaning of 28 U.S.C. § 2265(a). See Pet. App. 6a n.3, 8a, 81a. Thus, to qualify under Chapter 154, California must have "established by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel," and the rule of court or statute must "provide standards of competency for the appointment of such counsel." Further, the state's mechanism must include an offer of counsel and entry of an order providing appointment unless the prisoner is not indigent or enters a valid waiver. *Id.* at 79a, 81a.

5. a. On the day of the AEDPA's enactment, respondent filed a class action civil rights suit against various state officials, see 42 U.S.C. § 1983, challenging application of Chapter 154 in California and seeking declaratory and injunctive remedies to prevent its enforcement in any federal court. Without addressing the state's claim of immunity under the Eleventh Amendment, the district court issued the requested injunction, *Ashmus v. Calderon*, 935 F. Supp. 1048 (N.D. Cal. 1996), and declared that California's capital review procedures failed to satisfy Chapter 154 in five respects.

First, the court observed that the California Supreme Court does not authorize state counsel to undertake "fishing expeditions" to uncover "*any*" basis for a collateral claim; rather, counsel first must identify facts "suggesting that a basis for habeas corpus relief may exist." While recognizing that this policy imposes a "sensible" limitation on the expenditure of public money, the district court nevertheless found it "objectively deficient" because, according to that court's understanding of state law, counsel are authorized to pursue only those collateral issues "that are knowable by reference to the four corners of the appellate record." 935 F. Supp. at 1070-1071. Furthermore, the district court observed that many death row inmates in California had requested, but not yet received, appointed counsel. Because California does not appoint counsel "immediate[ly]," the district court reasoned, the state fails to make appointments "upon a finding" that inmates are indigent and have accepted the state's offer. *Id.* at 1074-1075. The court also determined that California lacked qualifying competency standards for counsel inasmuch as the applicable standards appear in Section 20 of the Standards of Judicial Administration and that provision is, according to the district court's understanding of state law, neither a "rule of court" nor a "statute." *Id.* at 1072-1074. "[R]elatedly," the court also decreed that section 20's standards are not sufficiently "binding or mandatory" and the state had "provided [no] indication that the Supreme Court has followed § 20(c)'s recommendation and adopted these standards as binding upon itself." *Id.* at 1073-1074. Finally, the standards were deemed substantively deficient because they make "no mention of original habeas proceedings and * * * require[] no minimum experience whatsoever in habeas proceedings." *Id.* at 1074.

b. The Ninth Circuit, in a 2-1 decision, "reluctant[ly]" rejected the last point, *Ashmus v. Calderon*, 123 F.3d 1199, 1208 (1997), but otherwise agreed and affirmed. *Id.* at 1207-1208; see *id.* at 1208 ("California has presented no evidence indicating that the State actually follows the relied-upon standards when appointing counsel for condemned inmates"). The court denied the state's Eleventh Amendment immunity claim, reasoning that "California's announced intention to

invoke Chapter 154 without having complied with that Chapter's opt-in requirements * * * threatens to violate" the federal rights of capital prisoners. *Id.* at 1204-1206. The dissent concluded that respondent's suit was barred by the Eleventh Amendment. *Id.* at 1209-1210 (Beezer, J.).

c. This Court granted certiorari, 522 U.S. 1011 (1997), and unanimously reversed. *Calderon v. Ashmus*, 523 U.S. 740. Addressing respondent's theory that state officials had violated his federal rights, the Court observed that "California's assertions on Chapter 154 have no coercive impact on the legal obligations of either party." *Id.* at 749. Describing respondent's suit as an improper effort "to gain a litigation advantage," the Court ordered it dismissed for want of Article III jurisdiction. *Id.* at 747, 749. Death-sentenced prisoners, the Court observed, "obviously can litigate California's compliance with Chapter 154" in the regular course of habeas proceedings. *Id.* at 748. On remand, the Ninth Circuit vacated its earlier decision, reversed the judgment of the district court, and remanded to that court with directions to dismiss the complaint. 148 F.3d 1179-1180 (1998).

6. On September 22, 1998, the state filed a motion in respondent's habeas proceeding, seeking the district court's permission to brief Chapter 154's application. Record, Doc. No. 229. Permission was eventually granted,[2/] and on

---

2. While the state's request was pending, the district court, on October 9, entered an order in the civil rights proceeding, purporting to dismiss only respondent's "cause of action under the Declaratory Judgment Act"; it further ordered that the 1996 injunction barring state officials from urging application of Chapter 154 would "stand[] pending a ruling on the viability of [respondent's] section 1983 action." Record in N.D. Cal. No. 96-1533-TEH, Doc. No. 76. Accordingly, on October 16, the state's request was denied without prejudice: "If and when the preliminary injunction in the class action case is dissolved," the district court ordered, the state "may renew its [a]pplication." Record in N.D. Cal. No. 93-0594-TEH, Doc. No. 231. That same day, Justice O'Connor issued a temporary stay of the district court's October 9 order, and on October 20, the district court, noting that stay, vacated its October 16 order and granted the state's request to brief the Chapter 154 issue. *Id.*, Doc. No. 232. On October 26, the state filed its Chapter 154 briefing in the district court, *id.*, Doc. No. 236, and the

December 24, 1998, the district court issued an order in the habeas proceeding declaring, for largely the same reasons it had adopted in the earlier civil rights suit, that California's capital review process does not comply with Chapter 154. Pet. App. 63a-65a (failure of "immediate" appointments), 65a-66a (finding no "binding," "mandatory," or "legally enforceable" state-law right to collateral counsel), 68a-70a (finding the state's anti-"fishing expedition" rule incompatible with the requirement of reasonable funding)[3], 71a-78a (finding the state's competency standards insufficiently "binding and mandatory"; "the state supreme court's reliance on section 20 in practice does not raise section 20 to the status of a qualifying

---

state's application before this Court for an order enjoining enforcement of the district court's October 9 order was denied without prejudice. On October 28, the district court finally dismissed the civil rights suit outright and formally dissolved the 1996 injunction. Record in N.D. Cal. No. 96-1533-TEH, Doc. No. 81.

3. Four months before the district court's second Chapter 154 ruling, the California Supreme Court decided *In re Robbins*, 18 Cal. 4th 770 (1998), which explicitly corrected the misimpression that collateral investigation and funding in California is circumscribed by a "four corners rule." *Id.* at 793 n.15. In the wake of *Robbins*, the district court revised its analysis to identify a new and different "defect" in California's funding regimen: the rule that conditions funding on the identification of "specific issues to be explored and specific facts which suggest that a basis for a potentially meritorious habeas corpus claim exists." Pet. App. 65a, 68a n.25 ("California's mechanism for compensation and payment of habeas counsel is inadequate even if, as [the state] claims, the 1989 Policies do not restrict compensation to claims discoverable 'within the four corner[s] of the appellate record.'"); compare 935 F. Supp. at 1071. Similarly, the district court had earlier doubted whether "the California Supreme has followed § 20(c)'s recommendation and adopted these standards as binding upon itself." Pet. App. 175a. Later presented with "evidence that, in practice, the Supreme Court uses section 20 as the 'initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal,'" the district court concluded that "the state supreme court's reliance on section 20 in practice does not raise section 20 to the status of a qualifying procedure." *Id.* at 77a. There are other differences between the district court's two orders; in light of the subsequent decision of the Ninth Circuit, however, few of those differences appear to be of any enduring significance.

procedure"); *id.* at 71a (incorporating by reference the analysis formerly set forth at 935 F. Supp. at 1072-1074 (reproduced at Pet. App. 173a-179a)). Concerning the meaning of "binding and mandatory," the court offered the following amplification:

> Mandatory * * * does not mean discretionless. It simply means that the competency standards must establish a clear and obligatory baseline of competence. In this sense, the requirement that competency standards be mandatory is but a subset of the requirement that standards be provided by rule of court or statute, i.e., provided by procedures which *carry the force of law.*

Id. at 72a n.29 (emphasis added).

7. The state appealed, and urged the Ninth Circuit to certify to the California Supreme Court the following state-law questions, each of which the district court order had expressly or impliedly resolved contrary to the position advanced by the California Attorney General: (a) whether the California Supreme Court's Payment Guidelines for Appointed Counsel Representing Indigent Criminal Defendants contravene California Penal Code § 1241's explicit guarantee of "a reasonable sum for compensation and necessary expenses," and (b) whether the Payment Guidelines, the Death Penalty Policies, and the Section 20 standards had been adopted as "rules of court" pursuant to any provision of state law, including but not limited to California Government Code § 68070 (authorizing every court to adopt its own rules, see Pet. App. 94a) State's C.A. Mot. to Cert. State Law Questions to the Cal. Sup. Ct. 6-7.[4] The Ninth Circuit denied the state's motion, and affirmed. Of primary importance for present purposes, the

---

4. California law permits the state supreme court to "answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth provided that [¶] (1) the certifying court requests the answer; [¶] (2) the questions may be determinative of a cause pending in the certifying court; and [¶] (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question." Cal. R. Ct. 29.5.

court held, purely as a matter of federal statutory construction, that Chapter 154 "implicitly" forecloses qualifying states from specifying any exceptions to their counsel appointment standards or allowing the state's judiciary to inform the administration of those standards with discretionary considerations. Pet. App. 17a, 20a.

a. The Ninth Circuit did not decide whether the district court had correctly concluded that Chapter 154 compliance requires "immediate" appointment of state collateral counsel. Nor did it review the district court's determination that California fails to compensate collateral counsel for "reasonable litigation expenses." Pet. App. 10a n.6; *id.* at 12a-13a n.8.[5/] Instead, based on its understanding of California law in effect

---

5. The Ninth Circuit also declined to consider respondent's assertion that Chapter 154 could not be applied to his federal proceedings even if, as the state maintained, California perfected compliance on June 6, 1989, when, some 30 months before respondent's conviction was affirmed on direct appeal, the state supreme court *immediately and systematically extended the benefit of collateral representation* to respondent and all other prisoners whose capital appeals were then pending or previously resolved. Under respondent's analysis, in order for Chapter 154 to apply, California needed to have established a collateral appointment mechanism no later than March 27, 1987, when counsel was appointed to represent him on direct appeal—*i.e.*, 27 months *before* the district court believed the opportunity to litigate collateral claims in a "unitary" context had even come into existence. See Pet. App. 60a-61a. The district court accepted respondent's analysis (effectively penalizing California for *accelerating* the point at which the state-law right to collateral counsel attaches), *id.* at 54a-55a, but the Ninth Circuit determined that it "need not decide which date is correct." *Id.* at 12a. Had the Ninth Circuit adopted respondent's view, it would have produced an evident split of authority. See *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996) (compliance not demonstrated by procedures "not yet set up" at time state petition was *denied*); see also *Wright v. Angelone*, 944 F. Supp. 460, 463 (E.D. Va. 1996) (compliance should be determined by reference to the state system as it existed "at the time a petitioner *first received appointment of counsel in the post-conviction process*") (emphasis added)); *Weeks v. Angelone*, 4 F. Supp. 2d 497, 506 (E.D. Va. 1998) (compliance criteria relating to appointment plainly satisfied because change in state law that made appointment of collateral counsel "automatic" predated both appointment of counsel *for collateral proceedings* and the finality of those proceedings).

between 1989 and 1998 (see note 1, *supra)*, the court first ruled Chapter 154 inapplicable because the state "failed to establish its appointment mechanism 'by rule of its court of last resort or by statute' as required by 28 U.S.C. § 2265(a)." Pet. App. 12a. In its initial opinion, the court explicitly rested this conclusion on two assumptions of state law: (1) "California's appointment mechanism was established only in its 1989 Supreme Court Policies and Rule XIII (subsequently Rule XIV) of the Internal Operating Practices and Procedures (IOPPs) of the Supreme Court of California," and (2) neither the Policies nor Rule XIII "is a rule of court or statute" or, therefore, "binding and mandatory." *Id.* at 33a-34a (explicitly "contrast[ing]" Rule XIII and the Policies with, *inter alia*, "numerous provisions of the decisional law" which *are* "mandatory and binding"). "Chapter 154 * * * requires a mandatory and binding appointment mechanism," the court declared, "and, at all times relevant to Ashmus, California failed to provide one." *Id.* at 35a.

The court did not initially cite or discuss the California Supreme Court's 1968 decision in *Anderson*, which created the state-law right to collateral representation in capital cases (although the court otherwise acknowledged the "binding and mandatory" character of state decisional law generally, see *id.* at 34a). The court also did not initially cite or discuss the 1999 decision in *In re Sanders*, 21 Cal. 4th 697 (1999) (cited and copied to the court pursuant Fed. R. App. P. 28(j) on Sept. 23, 1999), which both (1) explains that *Anderson*, the IOPPs, and the Policies are among the provisions of California law that "all require" the appointment of capital collateral counsel, and (2) refers to the Death Penalty Policies as "rules" no fewer than 14 times. 21 Cal. 4th at 704, 706, 707-711, 713, 716-721, 723. In a footnote, the Ninth Circuit acknowledged that Congress was familiar with California's Death Penalty Policies and that the legislative history of Chapter 154 also refers to the Policies as a "rule of [the state's] supreme court," but the Ninth Circuit dismissed this reference as "isolated" and contrary to the "plain meaning of the statute and California's rules, policies, procedures, and policies [sic]." Pet. App. 13a n.9. The court further acknowledged that California Government Code § 68511.5 (a statute) "directs the [state] Judicial Council to 'adopt rules of

court regulating the selection of appointed counsel,'" and that California Rule of Court 76.5 (a rule) in turn "requires each appellate court to 'adopt procedures for appointment of counsel in criminal cases'"; these provisions, the court nevertheless concluded, did not "establish" California's appointment mechanism because neither "embodie[s]" the mechanism or "itself contain[s]" the state's procedures. Pet. App. 15a-16a.[6/]

b. As a second ground for disqualifying California, the Ninth Circuit concluded that the state has no "statute or rule of court providing standards of competency for the appointment of collateral counsel." Pet. App. 17a. The court construed Chapter 154 to impose two requirements in this regard: First, in order to "provide" standards within the meaning of Chapter 154, the relevant state statute or rule must "contain"—not merely "authorize"—the standards. Although the district court had distilled such a requirement by "direct implication," *id.* at 77a-78a, the Ninth Circuit deemed it to be "expressly state[d]" in Chapter 154. *Id.* at 17a. Second, "[t]he statute and legislative history also require that such standards be binding and mandatory." Unlike the district court, however, the Ninth Circuit did not define *its* "binding and mandatory" requirement as merely "a subset of the requirement that competency standards be provided by rule of court or statute, i.e., provided by procedures which carry the force of [state] law"; rather, under the Ninth Circuit's analysis, state-law definitions were not "determinative." The court characterized this second requirement as "implicit[]." *Ibid.*

---

6. In another footnote, the court expressed doubts whether § 68511.5 and rule 76.5 had any relevance at all since both "refer to 'criminal appeals,' not post-conviction proceedings," and § 68511.5 "refers to the 'appointment of counsel in all *appellate districts*,' which is a clear reference to the intermediate state appellate courts, rather than the state supreme court." Pet. App. 16a n.12 (emphasis by court). The court would later reiterate that § 68511.5 "contemplates the appointment of counsel on direct, not collateral, appeal." *Id.* at 21a. But see *id.* at 5a ("'[a]ppellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus'") (quoting Death Penalty Policy 3.1.1-1 (Pet. App. 89a)); see also note 12, *infra*.

i. The "express" requirement that the rule or statute actually "contain" the state's competency standards derives, according to the Ninth Circuit, from Congress's choice of the word "provide." Pet. App. 17a, 21a. Believing "provide" to have an "unambiguous meaning," the court rejected the construction that a rule or statute might "provide" standards by authorizing their promulgation in some other legal instrument. *Id.* at 20a-21a. Thus, while acknowledging that § 68511.5 and rule 76.5 explicitly "requir[e] the adoption of 'procedures for the appointment of [appellate] counsel'" the court reasoned that they do not "provide" (or "require") competency standards for collateral counsel. "[A]t best," the court discerned, "they merely permit them." *Id.* at 21a.

Having rejected any definition of "provide" other than "contain," the court resolved that California could qualify under Chapter 154 only if Section 20 of the Standards of Judicial Administration were itself a "rule," for that is where California's competency standards "are set out." Pet. App. 18a. The court then concluded:

> Section 20 is not a rule of court or statute, however. It is neither binding nor mandatory. Section 20 uses hortatory language—"should." * * * Section 20 is thus a "'recommendation[] to the courts'" made under the Judicial Council's authority to make recommendations under the state constitution; it is not a rule of court. * * * Also, as a recommendation to the Court, section 20 cannot be considered mandatory or binding. * * * Section 20 is not, therefore, a qualifying competency standard within the meaning of 28 U.S.C. § 2265(a) * * * *

Id. at 18a-19a (citations and footnote omitted). The Ninth Circuit acknowledged that state *courts* are *independently* authorized under California Government Code § 68070 to adopt their *own* rules. See *id.* at 94a. The court also acknowledged evidence that the California Supreme Court uses Section 20 "as an 'initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal.'" *Id.* at 20a (citing district court opinion); see *id.* at 77a; State C.A. Excerpt of Rec. 138-139 (sample correspondence from

California Supreme Court to capital counsel applicants); *id.* at 157 (Report of Judicial Council Advisory Committee). Yet the proposition that the Section 20 standards had acquired dignity as a rule of court under state law by virtue of the state supreme court's adoption of them under § 68070 was dismissed with three observations: (1) the state had presented "no evidence that section 20 was actually promulgated under that code section," (2) the view that Section 20 came to be adopted under § 68070 "is directly contradicted" by the fact that Section 20 was initially issued by the Judicial Council as a "recommendation to the courts" and "not a rule of court at all," and (3) "the California Supreme Court's compliance in practice" with Section 20 would not meet "the federal statutory command." Pet. App. at 19a, 20a. The Ninth Circuit did not identify any state authority under which the California Supreme Court could have adopted the Section 20 standards *other than* § 68070 (and petitioner knows of none).

ii. Alternatively, and without regard to the Section 20 standards' character as rules within the meaning of state law, the Ninth Circuit determined those standards still would not satisfy the "implicit" federal statutory requirement that they be "binding and mandatory." No rule, according to the Ninth Circuit, is sufficiently "binding and mandatory" for Chapter 154 purposes if judicial discretion is allowed to inform its application or if it is subject to exceptions and discretionary departures. *Id.* at 17a ("the decision to follow the standards [is] left to the discretion of a court or guideline administrator"); *id.* at 20a ("the section 20 guidelines need not be applied in any form if the court contracts with an 'administrator' to supervise the appointed counsel, * * * and the State points to no standards of competency for such an administrator"). Allowing state judicial discretion to inform the application of state competency standards, the Ninth Circuit reasoned, would "eviscerate[]" Chapter 154's requirement of competent counsel and "necessitate a case-by-case analysis [by federal courts] to determine whether a state is entitled to the benefits of Chapter 154, a piecemeal consequence that Congress sought to avoid." *Id.* at 17a. While acknowledging, in part, that Congress intended to afford the states considerable "latitude" in developing qualify-

ing standards, the court concluded that this concern did not extend to matters of application; rather, Congress's concern for the states' "latitude" was confined to the substance of their standards. *Id.* at 20a n.18.

c. Explaining its refusal to certify any of the disputed state-law questions on which it made pronouncements, the court deemed those questions, while "relevant," neither "determinative" nor "novel." The court further stated that the ultimate issue under review—compliance with Chapter 154—was "manifestly a question of federal statutory interpretation" which the California Supreme Court was "in no better position" to resolve. Pet. App. at 10a-11a n.6.

d. The state sought rehearing and rehearing en banc, pointing out that the panel decision contained numerous errors of state and federal law. The state also filed a second motion to certify questions of state law, and noted that the California Supreme Court then had pending before it the question of that court's authority to adopt its Death Penalty Policies pursuant to the rulemaking power conferred under § 68070. Pet. for Reh'g 1-15; State's Second Mot. to Certify State Law Questions 1-4.

e. On February 8, 2000, the panel denied the state's second certification motion. Pet. App. 23a. The petition for rehearing and rehearing en banc was denied on March 9, 2000. *Id.* at 4a. By order of that same date, the court amended the opinion to delete the discussion culminating in the conclusion that "at all times relevant" to respondent, "California failed to provide" a "mandatory and binding appointment mechanism." *Id.* at 2a. The deleted discussion was replaced with a passage acknowledging that appointment of state collateral counsel in capital cases is indeed "a requirement of state law." With citation to *Sanders*, the amended opinion further acknowledges that this state-law requirement derives from, *inter alia,* the California Supreme Court's 1968 decision in *Anderson*—the "binding and mandatory" character of which had earlier been noted. Nevertheless, the amended opinion concludes that "[e]stablishment by decision is not enough" because Chapter 154 requires establishment of the counsel appointment mechanism "by rule of * * * court of last resort or by statute." *Id.* at 2a-3a. The amended opinion does *not* acknowledge that

appointment of capital counsel is *also* required by the California Supreme Court's Death Penalty Policies. Compare *id.* at 2a ("*Sanders* states that *Anderson*, the IOPPs, and the 1998 statute 'all require' appointment of capital collateral counsel") with *Sanders*, 21 Cal. 4th at 719 ((i) "*In re Anderson* * * *, (ii) this court's own Internal Operating Practices, (iii) *policy 3 of the Supreme Court Policies*, and now (iv) Government Code section 68662 all require such appointment") (emphasis added). And although the amended opinion reasserts that the Policies "are not rules" of the California Supreme Court, Pet. App. 2a-3a, it does not address the fact that the California Supreme Court repeatedly referred to them as rules throughout *Sanders*.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that Chapter 154 "implicitly" requires qualifying states to fashion counsel competency standards that are "binding and mandatory" in the sense that they allow no exceptions, no opportunity for departure, and no occasion for state courts to inform the application of those standards with any discretionary considerations. This construction presents an issue of immense and enduring significance to states seeking to achieve and demonstrate compliance with Chapter 154. The court's decision finds no support in the language of Chapter 154, in its legislative history, or in analogous provisions of federal law; it also deviates in critical respects from the reasoning reflected in the only other extant circuit authority to analyze Chapter 154's terms. The Ninth Circuit's far-reaching misreading not only frustrates California's previous compliance efforts, but threatens to undermine the efforts of most other states that also "already ha[ve] done [their] part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." *Lindh v. Murphy*, 521 U.S. at 331.[7] The decision thus affects a large number of pending and future proceedings (a minimum of about 300 in California alone (see note 1, *supra*)), and does so in a

---

7. See Pet. App. 95a-172a (compilation of standards governing the appointment of capital collateral counsel in federal courts and 20 states).

way that gravely undermines Congress's twin objectives of expediting federal habeas review of capital cases and promoting reform of state collateral procedures. Indeed, the decision will most likely have the regrettable consequence of encouraging many states to *reduce* the level of procedural benefits they currently extend to death-sentenced prisoners on state collateral review, and will assuredly diminish any incentive the remaining states might have had to make improvements in that same regard. Accordingly, this Court's review is warranted.

The Ninth Circuit's analysis of California's compliance with Chapter 154 also suffers from numerous misapprehensions of state law. The substance of those errors, of course, does not merit this Court's review at this juncture. Rather, it is the circumstances that *led* to those errors—the Ninth Circuit's failure to invite the aid of the California Supreme Court—that raise profound concerns of federalism and comity. As grave as those concerns are, however, they can effectively be addressed in the current context with minimal supervisory intervention by this Court: On remand, the Ninth Circuit need only be reminded that, because it "lack[s] competence to rule definitively on the meaning of state [law]," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997), it should avail itself of the state's certification process to secure an authoritative construction of all provisions of state law relevant to the determination of California's compliance with Chapter 154. See *id.* at 77-80.

1. Chapter 154 nowhere states that complying standards of counsel competency must be "binding and mandatory." The Ninth Circuit's conclusion that Congress imposed this additional condition "implicitly" does not withstand analysis.

a. To be sure, Congress did prescribe *how* states must "provide" qualifying standards: by "rule of court or statute." But few rules and statutes in American law are without any exceptions, and many if not most *require* that discretion be exercised in their application. Tellingly, the Ninth Circuit did not identify a single rule of any court that would meet its conception of "binding and mandatory," and none comes readily to mind. Compare generally, *e.g.*, Fed. R. App. P. 2 (authorizing suspension of rules, on a case-by-case basis, "to expedite [the court of appeals'] decision or for other good

cause") with Pet. App. 18a ("'A state does not qualify under Chapter 154 by setting forth competency standards that the state can completely disregard when appointing counsel'") (quoting *Ashmus v. Calderon*, 123 F.3d at 1208); compare Tax Court Rule 200(c) ("An applicant for admission by examination must be sponsored by at least two persons theretofore admitted to practice before this Court * * *. The Court may in its discretion accept such an applicant with less than two such sponsors") with Pet. App. 17a ("The requirement of competent counsel * * * would be eviscerated if the decision to follow the standards were left to the discretion of a court or guideline administrator").[8/] Indeed, not only will resort to ordinary rulemaking and legislative processes rarely be sufficient to create the "binding and mandatory" features the Ninth Circuit would demand of the states, those devices are not necessary, or even the most effective means, to that end (as the Ninth Circuit eventually came to recognize). Pet. App. 13a-14a (acknowledging that the California Supreme Court's IOPPs, which the Ninth Circuit is certain are *not* rules of that court, nonetheless *require* appointment of capital collateral counsel); *id.* at 14a-15a (concluding that California decisional law, though also "binding on [its] face," is "not enough" to effect compliance with Chapter 154's requirements). Thus, the requirement that standards be provided by "rule of [state] court of last resort or

---

8. Compare also, *e.g.*, 18 U.S.C. § 3501(b) (listing circumstances that must be "take[n] into consideration"—but no one of which must be deemed "conclusive"—when determining whether a confession was made voluntarily) with Pet. App. 20a (observing that Cal. R. Ct. 76.5 "is a rule of court, but it says only that the court shall 'consider' the section 20 guidelines, and the guidelines themselves require nothing"); compare *Ohio v. Roberts*, 448 U.S. 56, 62 (1980) ("The basic rule against hearsay, of course, is riddled with exceptions") and *Regents of the Univ. of Calif. v. Public Employment Relations Bd.*, 485 U.S. 589 (1988) (noting that there are "numerous exceptions to the Private Express Statutes" (18 U.S.C. §§ 1693-1699, 39 U.S.C. §§ 601-606)) with Pet. App. 20a ("under California's unitary review scheme the section 20 guidelines need not be applied in any form if the court contracts with an 'administrator' to supervise the appointed counsel * * *, and the State points to no standards of competency for such an administrator").

statute" (which will turn strictly on state-law definitions) in no manner "implies" that those standards must be "binding and mandatory" in the peculiar sense suggested by the Ninth Circuit. Compare *id.* at 18a-19a (conflating these two "requirements") with *id.* at 10a n.6 (insisting that the Section 20 standards' status as rules under state law is not determinative).[9]

b. Nor is the Ninth Circuit's reading supported by Chapter 154's legislative history, which demonstrates the unremarkable proposition, itself explicit in the statute, that a complying state "must" *provide* standards, but says nothing that even remotely suggests Congress sought to dictate how states must *apply* their standards. Pet. App. 17a ("'[To qualify] a State would have to establish a system for the appointment and compensation of competent counsel throughout all stages of postconviction review'" (quoting Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Powell Committee Report (1989), 135 Cong. Rec. at S13483)); see also Pet. App. 18a n.13 ("'Central to the efficacy of [the

---

9. No state, it must be observed, has yet been adjudged to have a qualifying mechanism. But the only other extant circuit decision to interpret Chapter 154's requirements is *not* supportive of the Ninth Circuit's peculiar understanding. See *Mata v. Johnson*, 99 F.3d 1261, 1266-1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (1997). Although Texas law "delegates the task of developing competency standards to Texas's highest criminal court, * * * the Texas Court of Criminal Appeals ha[d] failed to fulfill its delegated task," and instead evaluated individual counsel applicants without benefit of *any "explicit* standards of competency"; accordingly, the Fifth Circuit had no difficulty concluding that Texas was "not yet eligible to take advantage of the provisions afforded opt-in states under the AEDPA." *Id.* at 1266-1267 (emphasis added). One can plausibly read Chapter 154, as the Fifth Circuit apparently did, to require "binding and mandatory" standards in the limited sense that those standards must be "explicit" and *have the force of law. Id.* at 1267 & n.13; see also Pet. App. 72a n.29, quoted *supra* at page10. But the only law under which state standards can have force, of course, is *state* law, and that is precisely the subject on which the Ninth Circuit, believing it *not* to be determinative, refused edification. Thus, contrasting the Fifth Circuit's decision in *Mata* with the Ninth Circuit's decision in this case only highlights the urgent need for clarification. Compare Pet. App. 18a n.14 (citing *Mata)*

Chapter 154] scheme is the development of standards governing the competency of counsel'" (quoting Powell Committee Report, 135 Cong. Rec. at S13483)); see also Section-by-section Analysis of the Comprehensive Violent Crime Control Act of 1991, 137 Cong. Rec. at S3220 ("At a minimum, * * * these states [must] focus on an[d] articulate standards * * *"), quoted at Pet. App. 178a. The Ninth Circuit's contrary "implication" rests on the following reasoning:

> The requirement of competent counsel at all stages of the proceedings would be eviscerated if the decision to follow the standards were left to the discretion of a court or guideline administrator. Moreover, in the absence of mandatory standards, federal courts would be unable to evaluate the adequacy of a state's appointment mechanism without examining the competency of individual counsel. This approach would necessitate a case-by-case analysis to determine whether a state is entitled to the benefits of Chapter 154, a piecemeal consequence that Congress sought to avoid.

Pet. App. 17a. As noted, however, rules and statutes are not ordinarily "eviscerated" by exceptions, or through their judicious application, and it seems doubtful that Congress thought the only alternative to "case-by-case" federal judicial oversight of state collateral appointment processes was denying states the prerogative to administer their counsel competency standards with reasonable flexibility and prudence. On this score, far more telling than the Ninth Circuit's supposition about congressional intent is the legislative history itself, which reveals the following view:

> The latitude afforded to the states in defining specific standards of counsel competence is also desirable in a new procedure of this type, and would enable all the states to learn from experience *the most effective means of ensuring competent counsel through the exploration of different approaches.*

137 Cong. Rec. at S3220 (emphasis added). Without disputing that Congress contemplated the states would retain considerable

"latitude" to fashion qualifying standards, the Ninth Circuit discerned that Congress's concern for flexibility was limited to the *substance* of state standards; on the manner of their *application*, by contrast, Congress was unyielding. In reaching this understanding, however, the court explicitly omitted from its consideration the last 34 words of the passage quoted directly above. See Pet. App. 20a n.18.

c. States seeking to satisfy congressional expectations on the subject of counsel standards would probably think it instructive to examine how Congress itself prescribed standards to govern the appointment of capital collateral counsel in *federal* court. Although feeling no compulsion to replicate the federal regimen in every detail, a state could reasonably assume that adoption of some rough approximation of Congress's own model would surely suffice to demonstrate that it, too, "provide[s] standards." Under the terms of 21 U.S.C. § 848(q) (6), collateral counsel appointed to represent prisoners sentenced to death in federal court are required to "have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." Pet. App. 95a. Pursuant to subdivision (q)(7) of section 848, however, "the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." *Id.* at 95a-96a. Thus, federal counsel standards are effectively no more "binding and mandatory" than those of California (as well as a good many other states (see pages 23-24, *infra*)), and the "implication" the Ninth Circuit would ascribe to Congress is altogether implausible.

d. Further insight on congressional expectations can be gleaned from the "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" recommended by the American Bar Association in February 1989. In the commentary section following specification of "experiential criteria" for appointment of counsel, it is explicitly

> acknowledge[d] that there are many attorneys who *do not possess the experiential criteria detailed in the Guideline, but who should receive appointments because they will provide competent representation at trial, appeal and/or postconviction*. Such attorneys may have criminal law experience which does not meet the experiential criteria, may have attended training in death penalty defense representation or may have substantial experience in civil practice. *These attorneys should receive appointments if the appointing authority is satisfied the defendant or inmate will be provided with the same quality of representation as clients represented by attorneys who met the experiential criteria.* Attorneys who are appointed under the "Alternate Procedures" clauses of this Guideline [see, *e.g.*, Pet. App. 123a] obviously have an obligation to consult with other attorneys who are expert in death penalty defense, to attend specialized training and to do whatever else is necessary to allow them to provide competent representation to their clients.

Pet. App. 125a (emphasis added). The ABA's Guidelines themselves give effect to this assessment, allowing appointment under "Alternate Procedures" if "it is clearly demonstrated to the appointing authority that competent representation will be provided." *Id.* at 123a.

It is little wonder, then, that the majority of states adopting comprehensive mechanisms for the appointment of collateral counsel in capital cases have devised standards far more reflective of the "latitude" Congress sought to preserve than of the "binding and mandatory" construct the Ninth Circuit would seek to impose. Kansas, for example, has explicitly incorporated by reference the ABA's Guidelines, including the "Alternate Procedures." See Kan. Admin. Regs. 105-3-2; Pet. App. 116a. Idaho and Oregon have, in effect, done the same. Idaho Crim. R. 44.3(3)(b)(2) (effective September 15, 2000); Pet. App. 112a; Or. R. Appt. Counsel Std. 3.1(4); Pet. App. 157a. New York permits a "waiver" of its appointment standards, and even establishes a "review" procedure by which an attorney rejected by a screening panel can be added to the

appointment roster "if the Court deems the attorney qualified to serve as post-conviction counsel in a capital case." N.Y. Ct. Rules § 515.2(1)(b) & (3)(b); Pet. App. 142a, 143a. In Washington, the state supreme court has promulgated capital collateral counsel standards, yet expressly retains "final discretion in the appointment of counsel in personal restraint petitions in capital cases." Wa. R. App. P. 16.25; Pet. App. 172a. Arizona law is to a similar effect, Ariz. Rev. Stat. § 13-4041; Pet. App. 97a; Ariz. R. Crim. P. 6.8(d); Pet. App. 98a, as is the law of Mississippi, Miss. R. App. P. 22(c); Pet. App. 131a. Maryland requires the establishment of counsel lists and requires their "maximum use," but only "insofar as practical." Md. Code Ann., Art. 27A, § 6; Pet. App. 127a. Nevada requires counsel to satisfy minimum requirements, but permits "exceptions" if the appointing court is "satisfied that the attorney is competent and able to provide representation." Nev. Sup. Ct. R. 250; Pet. App. 139a-140a. Likewise, Ohio permits appointment of an attorney who "does not satisfy" specified requirements "if it can be demonstrated * * * that competent representation will be provided." Ohio Sup. R. 20, § II(C); Pet. App. 148a. Under specified circumstances, South Carolina, Arkansas, and California exempt from their general competency standards attorneys who have received previous collateral appointments from federal courts—which appointments, in turn, were subject to exemption from the criteria specified in § 848(q)(6) if, under § 848(q)(7), the federal court determined that adequate representation could be provided. S.C. Code Ann. § 17-27-160(B); S.C. R. Ct. 608(f); Pet. App. 158a, 160a; Ark. R. Crim. P. 37.5(c)(4); Pet. App. 100a; Cal. R. Ct. 76.6(k); Pet. App. 104-105a.[10/]

---

10. When California divided appellate and collateral representational duties between different counsel in 1998, it also reconfigured its appointment standards. See generally Cal. Gov't Code § 68662. The qualification standards, the "alternative qualifications," and the narrow exceptions to both are now set forth in Cal. R. Ct. 76.6(e)-(f), (j) & (k). See Pet. App. 102a-105a. Significantly, at the time of new rule 76.6's adoption, it was announced that the new rule simply "sets forth *in greater detail* the standards *previously embodied in section 20(c) of the Standards of Judicial*

The foregoing states have made the eminently reasonable judgment that the flexible application of relatively stringent appointment standards affords a greater assurance of competent representation than would an unfailingly rigid application of less-demanding ones. None of these states "fails to provide standards." To the contrary, all have "develop[ed]," "focus[ed] on," and "articulate[d]" competency standards, 135 Cong. Rec. at S13483; 137 Cong. Rec. at S3220, and otherwise "done [their] part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." *Lindh*, 521 U.S. at 321. Nevertheless, the Ninth Circuit's construction of Chapter 154 gravely jeopardizes any prospect that the "quid pro quo" envisioned by Congress, see Pet. App. 7a, will be honored in these jurisdictions.

States that feel constrained to redesign their capital review mechanisms to accommodate the Ninth Circuit's understanding of Chapter 154 will likely meet that challenge by *diluting* the content of their standards, sensing that the "binding and mandatory" requirement imposed on their application would prove unworkable otherwise. Alternatively, some states might well conclude that the terms of the "quid pro quo" (as defined by the Ninth Circuit) are entirely too costly, and abandon compliance efforts altogether. Certainly the Ninth Circuit's decision will do nothing to encourage additional reform in those states that have yet to decide whether to effect compliance, which may well be where state reform is most needed.

e. Despite the decidedly inhospitable reception Chapter 154 has endured in some lower courts, see, *e.g.*, *Wright v. Angelone*, 944 F. Supp. at 465-468 (decrying Virginia's mechanism as "a loose collection of statutes and regulations which lack binding enforcement mechanisms and which may be subject to differing interpretations"), one could reasonably expect that, in time, a decision as wrong as the Ninth Circuit's will be explicitly rejected by other circuits. Nevertheless, pressing concerns of extraordinary practical and constitutional

---

Administration." State C.A. Excerpt of Rec. 141 (Admin. Off. of Courts announcement of new rule 76.6) (Feb. 27, 1998) (emphases added).

importance call for the Court's review at this time.

Congress explicitly made Chapter 154 immediately applicable to pending cases, 110 Stat. 1226, reflecting the urgency of its resolve to break the nationwide logjam of capital cases that had amassed over the course of two decades. Questions relating to state compliance, however, are of no juridical moment until an affected state judgment reaches federal court on collateral review, and the delay separating this event from the actual effectuation of compliance at the state level is typically lengthy. Under these circumstances, deferring authoritative construction of Chapter 154 in favor of protracted percolation though district and circuit courts would unduly frustrate Congress's design for promoting procedural reform. In contrast, by reviewing the decision of the Ninth Circuit, this Court can supply states with the guidance necessary to achieve swift, certain, and widespread compliance with Chapter 154, thereby facilitating the expeditious resolution of collateral litigation in federal court, and further advancing Congress's ancillary goal of "*ensuring fairness and protecting the constitutional rights of capital litigants.*" Powell Committee Report, 135 Cong. Rec. S13482 (emphasis added), quoted at Pet. App. 51a. Protracted death penalty litigation is an unqualified evil: It undermines finality—a concern of "special importance in the context of a federal attack on a state conviction," *McCleskey v. Zant,* 499 U.S. 467, 491 (1990)—and raises troubling questions bearing on the *fairness with which condemned prisoners are treated*, see *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J.) (memorandum respecting denial of certiorari). Congress has prescribed a solution to this national crisis, but fair and consistent implementation will require this Court's authoritative guidance.

2. The Ninth Circuit's decision incorporates the following three conclusions of California law, all contrary to the understanding of the California Attorney General:

• The California Supreme Court's Death Penalty Policies and IOPPs are not "rules" of that court.[11/]

---

11. The Ninth Circuit would not have needed to reach this question if

• Rule 76.5 and § 68511.5 do not "contemplate" appointment of collateral counsel by the California Supreme Court in capital cases.[12]

• Notwithstanding the California Supreme Court's demonstrated "use" of the Section 20 standards, the court never adopted those standards, or, if it did adopt them, it did not do so pursuant to § 68070 or any other provision of state law that

---

it had not first concluded that (1) a provision of law cannot "establish" a mechanism unless it "embodies" it and (2) state court rulemaking accomplished "by decision" is "not enough" to achieve compliance with Chapter 154. The court's construction ignores that Congress is demonstrably capable of demanding actual "inclusion" when that is its intent. See Pet. App. 81a ("a unitary review procedure must *include* an offer of counsel" (emphasis added)). Moreover, so long as a method of rulemaking is proper as a matter of state law, we doubt Congress sought to distinguish among available methods in the way suggested by the Ninth Circuit. Nevertheless, because it seems unlikely either question has any continuing national importance, petitioner does not seek review of the court's preliminary conclusions and therefore assumes for present purposes that those conclusions are correct.

12. The Ninth Circuit needed to reach this subject only because it concluded that the California Supreme Court had not adopted the Section 20 standards as "rules." In considering the "contemplations" of rule 76.5 and § 68511.5, the Ninth Circuit evidently overlooked § 68511.5's *first* sentence, which refers generally to "criminal appeals by indigent defendants," not merely to proceedings before the *intermediate* appellate courts. See *id.* at 83a. At any rate, rule 39.50 (another provision of state law that the Ninth Circuit did not cite or discuss) makes the rules governing non-capital appeals in the intermediate appellate courts generally applicable to capital appeals before the California Supreme Court—which would also explain the latter court's practice of distributing copies of rule 76.5 to applicants for *capital* case appointments. State C.A. Excerpt of Rec. 138-139. See also Section 20 (adopted in conjunction with rule 76.5 and containing, in subdivision (c), competency standards specific to capital appeals before the California Supreme Court); Pet. App. 87a. Finally, the Ninth Circuit appears to have momentarily overlooked the fact that because appellate counsel and collateral counsel were generally one and the same throughout the period 1989-1998, any provision applicable to the former's appointment was, by state-law definition and "contemplation," applicable to the latter's as well. In all events, we believe this matter will be mooted by correction of the Ninth Circuit's third conclusion of state law.

would permit their adoption as "rules."[13/]

The Ninth Circuit advanced two reasons for refusing to certify any disputed state-law questions to the California Supreme Court: (1) the state-law issues in dispute were not "novel," as the views urged by the state Attorney General were contrary to the circuit court's own understanding of state law, and (2) none of the state-law issues on which the Ninth Circuit issued pronouncements was "determinative." Clearly, "the certification requests merited more respectful consideration than they received in the proceedings below." *Arizonans*, 520 U.S. at 78.

First of all, the Ninth Circuit's state-law conclusions will appear to lack "novelty" only if one ignores authoritative state-law sources with which that court's understanding is woefully inconsistent. Compare, *e.g.*, *Sanders*, 21 Cal. 4th at 704, 706-711, 713, 716-721, 723 (referring to the Death Penalty Policies as rules at least 14 times) with Pet. App.13a (insisting that the Policies are not rules as a matter of state law). At any rate, "federal courts should hesitate to conclude that '[a State's] Executive Branch does not understand state law.'" *Huggins v. Isenbarger*, 798 F.2d 203, 207-210 (7th Cir. 1986) (Easterbrook, J., concurring), quoted in *Arizonans*, 520 U.S. at 76 n.30. The Ninth Circuit having been *twice* earlier led astray by *respondent's* misdescriptions of California law, see 123 F.3d at 1208 (insisting that state investigative funding is limited by a "four corners rule"); Pet. App. 33a (insisting that the state's collateral appointment mechanism was established "only" in the Policies and IOPP Rule XIII), that court's reluctance to accept the Attorney General's understanding, or at least to heed his request for certification, is all the more puzzling.

Moreover, that a state-law question "*may* be determina-

---

13. The court reached this question only because it preliminarily concluded not only that a provision of law must "embody" a mechanism in order to "establish" it, but that a rule or statute cannot "provide" standards unless it "contains" them. The error of such a construction has been noted. Nevertheless, we again assume for present purposes that the Ninth Circuit's strained constructions of both "establish" and "provide" are correct.

tive" (see note 4, *supra*) is reason enough to certify it, for what a court actually treats as determinative is often conditional (see notes 11-13, *supra*), and "[t]aking advantage of certification made available by a State may 'greatly simplif[y]' an ultimate adjudication in federal court." *Arizonans,* 520 U.S. at 79; see also *Fiore v. White,* 120 S. Ct. 469, 473 (1999) (certifying question when answer "will help determine the proper state-law predicate" to federal question). Here, of course, the Ninth Circuit's assessment that none of its proclamations of state law was determinative rests entirely on the belief that Chapter 154 "implicitly" forecloses qualifying states from prescribing any exceptions to their counsel standards or allowing the state's judiciary to inform the administration of those standards with discretionary considerations. This error of federal statutory construction provided no warrant for making mis-pronouncements of state law as well.

"'Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when * * * the state courts stand willing to address questions of state law on certification from a federal court.'" *Arizonans,* 520 U.S. at 79 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)). Here, despite being made aware that important questions relating to the California Supreme Court's rulemaking authority had been raised before that court by another death-sentenced prisoner, see Pet. for Reh'g 6 n.4 (citing *In re Mayfield,* Cal. Sup. Ct. No. S08100), the Ninth Circuit discerned "no cause for federal-court hesitation." *Arizonans*, 520 U.S. at 80. Under this Court's precedents, "A more cautious approach was in order." *Arizonans,* 520 U.S. at 77. Granting the state's certification motions would have "save[d] 'time, energy, and resources and help[ed] build a cooperative judicial federalism.'" *Id.* at 77. These interests can still be served through certification on remand.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

BILL LOCKYER
Attorney General of California
DAVID P. DRULINER
Chief Assistant Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
Counsel of Record

APRIL 2000